

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

NATIONAL UNION FIRE INSURANCE)
 COMPANY OF PITTSBURGH, PA.,)
 AND AMERICAN HOME ASSURANCE)
 COMPANY,)

3:11-cv-00014-LRH-WGC

Plaintiffs,)

ORDER

vs.)

PORTER HAYDEN COMPANY, *et al.*,)

Defendants.)

Before the court is the Motion to Compel Compliance with Subpoena filed by National Union Fire Insurance Company of Pittsburgh, Pa. and American Home Assurance Company (Insurers). (Insurers' Mtn. to Compel (Doc. # 1).)¹ Specifically, the Insurers wish to compel compliance with a subpoena issued to third party, Western Asbestos Settlement Trust (WAST). (*Id.*) While the parties' joint statement (Doc. # 32) indicates an agreement that the Motion to Compel (Doc. # 1) need not be heard, the motion was not withdrawn, and the parties further agreed that an issue with respect to the subpoena remained to be heard and determined by the court, as discussed further herein. (*See* Doc. # 32 at 4 n. 3.)

The court held a hearing on this motion on November 22, 2011. (*See* Minutes (Doc. #35).) To the extent it was indicated in the Minutes of that hearing that the court would stay the Motion to Compel pending ruling by the District of Maryland on objections filed by Claimants regarding subpoenas issued to other claim processing facilities, the court

¹ Refers to court's docket number.

1 hereby lifts the stay, and issues the instant Order.

2 **I. BACKGROUND**²

3 This matter arises out of litigation currently pending in the United States District
4 Court for the District of Maryland, *National Union Fire Insurance Company of Pittsburgh,*
5 *Pa., et al. v. Porter Hayden Company*, 1:03-cv-03408-CCB, and *Porter Hayden Co., et al.*
6 *v. National Union Fire Ins. Co. Of Pittsburgh, Pa.*, 1:03-cv-03414-CCB (Coverage Action).
7 The Coverage Action arose out of a dispute between the Porter Hayden Company (Porter
8 Hayden) and its insurers, National Union Fire Insurance Company of Pittsburgh, Pa., and
9 American Home Assurance Company (Insurers).

10 Porter Hayden was an industrial and commercial insulation contractor operating in
11 the Mid-Atlantic states from the 1920's to the late 1980's. Until 1973, some of the insulation
12 materials handled, sold or distributed by Porter Hayden contained asbestos. In 2000, the
13 Coverage Action was filed, seeking to determine the extent of any obligation on the part of the
14 Insurers to defend and indemnify Porter Hayden for its asbestos bodily injury liabilities. In
15 2003, Porter Hayden filed a petition in bankruptcy and pursued a chapter 11 reorganization
16 with a channeling injunction issued under 11 U.S.C. § 524(g). Porter Hayden's reorganization
17 plan was confirmed in 2006, and all of its non-liquidated asbestos-related bodily injury
18 liabilities, existing or future, were channeled to the Porter Hayden Bodily Injury Trust
19 ("PHBIT").

20 In the course of discovery in the Coverage Action, the Insurers issued Federal Rule of
21 Civil Procedure 45 subpoenas to four asbestos claims processing facilities and one asbestos
22 trust individually, Western Asbestos Settlement Trust (WAST). As discussed further below,
23 WAST has objected to certain aspects of the subpoena. Asbestos claims processing facilities,
24 and asbestos trusts administer the submission, processing and payment of claims for
25 compensation for asbestos-related bodily injuries by individuals against a number of former
26

27 ² The court had requested the parties to jointly summarize the somewhat complicated background
28 of this action, and the parties' respective positions. The court's summary herein is predicated upon
the agreed statement of facts and positions presented by the parties. (See Doc. # 32.)

1 tort defendants. Specifically, WAST, located in Nevada, administers claims for the MacArthur
2 Company, Western Asbestos Company and Western MacArthur Company. The subpoenas
3 were issued from the district courts where the claims processing facilities were located, New
4 Jersey, Virginia, Delaware, Pennsylvania, and Nevada.

5 The subpoenas sought documents from WAST and the claims processing facilities with
6 respect to claimants who brought asbestos bodily injury claims against both the PHBIT and
7 any of the other trusts for which the claims processing facilities handle claims. The Insurers
8 have argued in the Coverage Action that if they owe any obligation to reimburse Porter
9 Hayden for bodily injury claims that have been paid through the PHBIT, then the amounts
10 of such settlements must have been reasonable. The Insurers wish to determine through the
11 documents requested in the subpoenas whether claimants who filed claims for compensation
12 with both PHBIT and one or more other trusts provided consistent information to each trust
13 as to work, exposure and medical history. The documents, the Insurers argue, will allow them
14 to determine the reasonableness of the claims settlements paid by the PHBIT, both as to
15 consistency and value.

16 Each of the claims processing facilities and WAST issued objections to the subpoenas.
17 Through meet and confer efforts, the Insurers agreed to limit the scope of information
18 sought, and in turn the claim processing facilities and WAST agreed to produce that limited
19 amount of claimant information. Each of these agreements, however, was contingent upon
20 WAST and Insurers entering into a confidentiality agreement and protective order, *to be filed*
21 *in the Coverage Action* (per terms of the Agreement), to protect the claimants' confidential
22 information and to provide a process by which the claimants could object to the production
23 of their claim information. As to each of the claims processing facilities, except for WAST,
24 a confidentiality agreement and protective order has been entered into, the claimants have
25 been notified of the proposed production, *and counsel on their behalf have filed objections*
26 *in the Coverage Action in the United States District Court for the District of Maryland.*
27 Those objections, along with other discovery motions, are set for a hearing in the District of
28 Maryland on December 15, 2011.

1 After being served with the subpoena, WAST reserved its right to serve objections to
2 production of the materials sought pursuant to Rule 45(c)(2)(B). (*See* Doc. # 1-7 (Ex. F).)
3 After unsuccessful attempts between the Insurers and WAST to resolve the scope of the
4 subpoenas, the Insurers brought a Motion to Compel herein. (Doc. #1.) In response, WAST
5 asserted various arguments, some of which mirror Porter Hayden's objections lodged in the
6 Coverage Action to the WAST subpoena. (*See* Doc. # 9; Doc. # 9-6 (Ex. 5).) The Porter
7 Hayden objections were predicated on Federal Rules of Civil Procedure 45 and 26.
8 (Doc. # 9-6 (Ex. 5) at 2.)

9 In the interim, with respect to the subpoena issued to WAST, the Insurers agreed to
10 limit the requested information to the claim forms submitted by the claimants, and WAST
11 agreed to provide that information, subject to the measures discussed above to protect the
12 claimants. The parties have already taken the initial steps toward that production. Pursuant
13 to an initial confidentiality agreement, the Insurers provided WAST with a list of the
14 individuals who brought claims against the trusts administered by WAST and identified all
15 of the matching claimants. The Insurers and WAST have agreed to almost all of the language
16 of the additional confidentiality agreement and protective order between them that is *to be*
17 *filed in the Coverage Action*.³ The only remaining point of contention is *where* the claimants
18 themselves should file any objections they may have to the document production, i.e., the
19 District of Nevada, where the subpoena was issued; or Maryland, where the Coverage Action
20 is pending, and as noted above, where the objections from claimants in other jurisdictions are
21 being resolved.

22 **II. THE PARTIES' POSITIONS**

23 **A. Insurers' Position**

24 The Insurers argue that any objections to the subpoena should be resolved in the
25 Coverage Action in the United States District Court for the District of Maryland. The
26 claimants who have brought claims against PHBIT would lodge any objections, not WAST.

27 ³ The draft confidentiality agreement and draft protective order prepared by the Insurers and
28 WAST are attached as Exhibits 1 and 2, respectively, to the parties' joint statement (Doc. # 32).

1 In response to the anticipated argument that the District of Nevada would be a more
2 convenient venue for objections, the Insurers contend that the claimants identified by WAST
3 could live anywhere at this time, so the District of Nevada is no more convenient than the
4 District of Maryland.

5 The Insurers also reiterate that *each of the other claims processing facilities agreed*
6 *that the claimant objections should be filed and heard in the Coverage Action in the District*
7 *of Maryland*. They also indicate that some of the WAST claimants may have also brought
8 claims against the trusts administered by the other four claims processing facilities in the
9 District of Maryland.

10 Finally, the Insurers claim that having the objections heard in the District of Maryland
11 would be in the interests of judicial economy and would avoid inconsistent results.
12 Specifically, the Insurers stress that the District of Maryland is overseeing the Coverage
13 Action and has extensive background knowledge that would be of assistance in resolving the
14 objections.

15 **B. WAST's Position**

16 WAST, on the other hand, argues that before production or disclosure of potentially
17 confidential information is made pursuant to the subpoena, the claimants, who are often
18 elderly or family members of deceased asbestos victims, should be provided an opportunity
19 to object in the District of Nevada, where the subpoena was issued. WAST also submits that
20 it should not be required to retain counsel and appear in federal court in the District of
21 Maryland, which likely does not have personal or subject matter jurisdiction.

22 **III. ANALYSIS**

23 Despite their disagreement on where the objections should be heard, the parties did
24 agree at the hearing on this motion that this court has jurisdiction, and it is within this court's
25 discretion, to make this determination. (*See* Doc. # 35 at 2.)

26 While WAST requests that the court retain jurisdiction to hear all matters related to
27 the subpoena, including objections filed by individual claimants to the disclosure of
28 information by WAST pursuant to the subpoena (*see* Doc. # 34 at 1-2), the court does not

1 currently have before it a motion to quash or modify the subpoena on behalf of the claimants.
2 Nor has a motion for protective order been filed by the claimants in this court. The dispute
3 surrounding the subpoena, however, does appear to be contingent on the execution of a
4 confidentiality agreement, and in that respect, the court interprets the request before it as a
5 motion to compel compliance with the subpoena.

6 In essence, what the parties are asking the court to do is determine where any future
7 motion to quash or modify the subpoena, or motion for protective order should be filed, so
8 that it may include such a provision in the proposed confidentiality agreement and protective
9 order to be filed *in the Coverage Action in the District of Maryland*. It is somewhat troubling
10 to the court that its ruling herein may affect persons not served with the Rule 45 subpoena
11 that is the subject of this dispute, and not parties to the underlying Coverage Action.
12 However, as will be explained below, the court believes that the need for uniform treatment
13 of any claimant objections is paramount. In that respect, the parties represent that claimant
14 objections to similar subpoenas served in other jurisdictions (New Jersey, Virginia, Delaware
15 and Pennsylvania), have been filed in the Coverage Action in the District of Maryland. A
16 hearing on those objections is scheduled in the District of Maryland on December 15, 2011.
17 Therefore, the court is of the opinion that uniform treatment of the resolution of such multi-
18 jurisdiction objections can most reasonably occur if one forum were resolving those
19 objections. Logically, that forum is the District of Maryland.

20 The court arrives at this conclusion, in part, because of the Advisory Committee's notes
21 to Federal Rule of Civil Procedure 26(c), which states, in relevant part:

22 The subdivision recognizes the power of the court in the district where a
23 deposition is being taken to make protective orders. Such power is needed
24 when the deposition is being taken far from the court where the action is
25 pending. The court in the district where the deposition is being taken may, and
26 frequently will, remit the deponent or party to the court where the action is
27 pending.
28 Fed. R. Civ. P. 26(c) Advisory Committee Notes.

29 While the motion currently before the court is one to compel compliance with a
30 subpoena under Rule 45, and not a motion for protective order under Rule 26(c), the court
31 finds the overarching principle of uniform treatment of discovery issues achieved by

1 remitting the issue to the court where the action is pending weighs in favor of having
2 potential claimant objections determined in the District of Maryland.

3 The text of Rule 26(c), as well as the Advisory Committee's comments, expressly
4 acknowledge that "a party or any person from whom discovery is sought may move for a
5 protective order in the court where the action is pending - - or as an alternative on matters
6 relating to a deposition, in the court for the district where the deposition will be taken." See
7 Fed. R. Civ. P. 26(c)(1), Advisory Committee Notes (emphasis added). According to the
8 explicit text of Rule 26(c)(1), a non-party served with a subpoena for documents in another
9 district (or a non-party with standing to object), as is the case here, could seek a protective
10 order concerning the scope of the subpoena in the district where the action is pending.

11 The court also relies on the rationale expressed in two unreported decisions from the
12 District of Nevada, *Platinum Air Charters, LLC v. Aviation Ventures, Inc.*, 2007 WL121674
13 (D. Nev. Jan. 10, 2007), and the District of Kansas, *Rajala v. McGuire Woods, LLP*, 2010
14 WL4683979 (D. Kan. Nov. 12, 2010).

15 In *Platinum Air*, a party to an action pending in the District of Nevada, Vision, filed
16 a motion for protective order under Rule 26(c), or alternatively, a motion to quash under
17 Rule 45 in the District of Nevada, concerning a subpoena issued by another district to third
18 parties. *Platinum Air*, 2007 WL121674 at *2-3. There, the opposing party argued that the
19 District of Nevada should refrain from ruling on the motion because only the district court
20 issuing the subpoenas has jurisdiction over all of the persons, including those served with the
21 subpoena. The District Court of Nevada determined it could, and that *it should*, address the
22 issues raised by Vision's motion. *Id.* at *3. The court reasoned:

23 Rule 45(c) does provide that subpoenas should be enforced by the district court
24 which issued them, but this rule 'does not alter the broader concept that the
25 district court in which the action is pending has the right and responsibility to
26 control the broad outline of discovery.' *Static Control Components, Inc v.*
27 *Darkprint Imaging*, 201 F.R.D. 431 (M.D.N.C. 2001) (citing *Fincher v. Keller*
28 *Industries, Inc.*, 129 F.R.D. 123, 125 (M.D.N.C. 1990)). General discovery issues
should receive uniform treatment throughout the litigation, regardless of where
the discovery is pursued. The court, therefore, concludes that it can and should
address the issues raised by Vision's request for a protective order, as these
issues extend well beyond the matter of a specific subpoena. *Static Control*,
201 F.R.D. at 434 n. 5.

1 *Platinum Air*, 2007 WL121674 at * 3.

2 In *Rajala v. McGuire Woods*, 2010 WL4683979 (D. Kan. 2010), a party to an action
3 pending in the District of Kansas filed a motion for protective order regarding a subpoena
4 served by the defendant to the District of Kansas action on a third-party law firm in Chicago,
5 Illinois. *Rajala*, 2010 WL4683979 at *1. The subpoena was issued by the Northern District
6 of Illinois. *Id.* As in *Platinum Air*, the defendant argued the district where the action was
7 pending did not have jurisdiction to rule on the motion, and only the court issuing the
8 subpoena could rule on the motion. *Id.* at *2. The defendant also argued that regardless of
9 whether the plaintiff styled his motion as a motion for protective order under Rule 26 or a
10 motion to quash or modify the subpoena under Rule 45, it was essentially asking the court
11 to modify the subpoena, and thus, only the District of Illinois could rule on the motion. *Id.*
12 at *3.

13 The District of Kansas, like the District of Nevada, determined that “it can and should
14 address the [] issues raised by [the] discovery motion.” *Rajala*, 2010 WL4683979 at * 7. The
15 District of Kansas relied heavily on the same language in *Static Control* as did the District of
16 Nevada in *Platinum Air*, i.e., while Rule 45(c) instructs that the issuing court should enforce
17 subpoenas, the underlying principles that the district court where the action is pending has
18 “a right and responsibility to control the broad outline of discovery” and that “[g]eneral
19 discovery issues should receive uniform treatment throughout the litigation, regardless of
20 where the discovery is pursued.” *Rajala*, 2010 WL4683979 at * 6 (quoting *Static Control*, 201
21 F.R.D. at 434).

22 The court in *Rajala* made the following conclusions which the court finds are worth
23 repeating here:

24 Notwithstanding the Rule 45(c)(3) principle that the district court which issues
25 the subpoena has the exclusive authority to rule on motions to quash or modify
26 the subpoena, this Court has the authority and responsibility to control the
27 broad outline and scope of discovery in the case. Thus, when a party files a
28 motion for protective order in this Court which would have the effect of
quashing or modifying a subpoena issued from another district, this Court may
entertain that motion where (1) the issues raised are central to the case and
extend beyond the specifics of the particular subpoena, and (2) the requested
ruling is necessary to insure that general discovery issues will receive uniform

1 treatment, regardless of the district in which the discovery is pursued.
2 Certainly, this Court has the obligation to insure that another district does not
3 broaden the scope of discovery beyond what would be allowed in this Court or
otherwise enter an order that would be inconsistent with the scope of discovery
already drawn by this Court...

4 *Rajala*, 2010 WL4683979 at * 7.

5 The court concludes here, as in *Platinum Air* and *Rajala*, that the overriding interest
6 of uniform treatment of discovery requires the claimants' objections be brought and
7 determined in the District of Maryland, where the Coverage Action is pending. This approach
8 is consistent with the manner in which objections to subpoenas have been lodged by those
9 whose claim information has been subpoenaed in other districts. As indicated above, the
10 District of Maryland is scheduled to make a determination with respect to claimants objecting
11 to subpoenas issued from district courts in New Jersey, Virginia, Delaware, Pennsylvania to
12 trusts and claims processing facilities in those districts on December 15, 2011. It is important
13 that the objections filed by the claimants, no matter where they are located, be treated
14 uniformly. Also, the interests of judicial economy favor resolution by the District of Maryland
15 which undoubtedly is more familiar with the underlying dispute and "has the right and
16 responsibility to control the broad outline of discovery" in the Coverage Action. *Platinum*
17 *Air*, 2007 WL121674 at * 3 (citations omitted).

18 The court recognizes that the motion pending before the court in *Rajala* was a motion
19 for protective order under Rule 26(c), and not a motion to quash or modify the subpoena
20 under Rule 45. This does not change the court's analysis, because the court is in a unique
21 position where the claimants' objections have not yet been raised, so it is not clear at this time
22 whether the claimants, if they file objections, will raise them in the form of a motion for
23 protective order under Rule 26(c) or as a motion to quash or modify the subpoena under
24 Rule 45, or both. The court only notes that "more typically parties join a motion to quash with
25 a request for protective order under Rule 26(c)." See *Rajala*, 2010 WL4683979 at *4. This is
26 exemplified in *Platinum Air*, where the District of Nevada, the court in which action was
27 pending, ruled that it could make the discovery determination where the party had brought
28 a motion for protective order under Rule 26(c), or in the alternative, a motion to quash under

1 Rule 45.⁴ The court would assume that because the Insurers and WAST agreed to file the
 2 proposed confidentiality agreement and protective order in the Coverage Action that any
 3 objection would take the form of a motion for protective order under Rule 26(c) filed in the
 4 District of Maryland.

5 Finally, the court does not find persuasive WAST's argument that by ruling that the
 6 objections should be determined in the District of Maryland, this court is compelling WAST,
 7 a non-party, to litigation in a court which lacks personal jurisdiction over it. (*See* Doc. # 34
 8 at 4-5.) The court is not compelling WAST to litigate in the District of Maryland. The court
 9 is ruling that any potential *claimant objections* to the subpoena served on WAST should be
 10 filed and determined in the District of Maryland. The issue of whether the District of
 11 Maryland would have personal jurisdiction over the claimants, or WAST for that matter, is
 12 not currently before the court.

13 **IV. CONCLUSION**

14 The court concludes that in the interests of having general discovery issues receive
 15 uniform treatment regardless of where the discovery is pursued, objections of the claimants
 16 to the subpoena served on WAST should be determined by the United States District Court
 17 for the District of Maryland, Baltimore Division. Counsel shall modify the draft
 18 confidentiality agreement found at Exhibit 1 to the parties' joint statement (Doc. # 32), to
 19 reflect the court's Order.

20 **IT IS SO ORDERED.**

21 Dated: December 2, 2011

22 
 23 WILLIAM G. COBB
 24 UNITED STATES MAGISTRATE JUDGE

25 ⁴ The court appreciates that a particular claimant may choose to style its objection to the
 26 subpoena solely as a Rule 45 motion to quash or modify the subpoena, and therefore, this court may
 27 be forced to revisit this issue. *See S.E.C. v. CMKM Diamonds, Inc.*, 656 F.3d 829 (9th Cir. 2011)
 28 (“We now join the Eighth and the D.C. Circuits and hold that the issuing court, and not the court
 where the underlying action is pending, has the authority to consider motions to quash or modify
 subpoenas under Rule 45 of the Federal Rules of Civil Procedure.”). In the event the court were faced
 with this situation, it intends to honor the principle of uniform treatment of discovery, and would give
 great deference to the rulings on similar claimant objections issued by the District of Maryland.